Supreme Court, U.S.
FILED

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No. _____

In the

Supreme Court of the United States

BEIBEI ZHANG,

Petitioner,

v.

ERIC HOLDER, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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April 12, 2010

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QUESTIONS PRESENTED

I. Whether the legal standard for having "reasonable grounds for regarding an alien as a danger to the security of the United States" requires that the alien actually pose a danger to the United States?

II. Whether the state-created danger doctrine applies in removal proceedings?

PARTIES IN PROCEEDINGS BELOW

Beibei Zhang, *Petitioner*

Eric H. Holder, Jr., Attorney General, who was automatically substituted for former Attorney General Alberto R. Gonzales, *Respondent*

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OPINION BELOW

The opinion of Court of Appeals for the Second Circuit was entered on October 16, 2009, under the caption Zhang v. Holder, No. 07-2119-ag (2nd Cir. 2009) (unpublished). The decision is attached hereto as Appendix A. Petitioner filed a timely Petition for Panel Rehearing. The Petition for Rehearing was denied on The Order is attached hereto as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 16, 2009. The Second Circuit Court of Appeals had jurisdiction over this matter under 8 U.S.C. § 1252 as there had been a final adjudication on the merits by the Board of Immigration Appeals on April 18, 2007. This Petition for Writ of Certiorari has been filed and docketed within the time limits prescribed as it was mailed within 90 days of the date the Petition for Rehearing was denied. Thus, the jurisdiction of this Court is properly invoked.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

8 U.S.C. § 1158(b)(2)(A)(iv) - bars to asylum eligibility

(2) Exceptions

(A) In general
Paragraph (1) shall not apply to an alien if the Attorney General determines that—

. . .

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

8 U.S.C. § 1231(b)(3)(B)(iv) - bars to withholding of removal eligibility

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that—

. . .

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

STATEMENT OF THE CASE AND FACTS

Beibei Zhang is a native and citizen of the People's Republic of China. She arrived in the United States on February 10, 1998 with a B-1 visa and was authorized to remain until December 31, 1998.

On January 6, 1999, Ms. Zhang filed an application for asylum and withholding of removal. (A.R. 6474-6489)[1] Her asylum case is based on religion as well as her cooperation with the United States Government.

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[1] A.R. refers to the citations in the Administrative Record.

Ms. Zhang graduated from the Dongbei University in July 1997. (A.R. 6482) At around that same time, her cousin, Hong Yu, requested that she work in the United States with him as an Operation Manager of Dailan East-Asia Metal, Inc. Id. Mr. Yu later told Ms. Zhang that the Dailan East-Asia Metal Company and its United States subsidiary were controlled by the Chinese National Security Bureau. Id. Ms. Zhang's cousin previously held an important position within the Bureau. Id. As the President of the U.S. Company, Mr. Yu's main task was to import high-technology machinery and equipment as well as military supplies from developed countries such as Japan and the United States. All the merchandise was labeled "scrap metal" to fool the Government. Id.

Ms. Zhang was able to obtain her passport and visa with the assistance of the National Security Bureau in China. Id. She entered the United States to assist her cousin with his business.

Ms. Zhang states in her application that her job was to help Mr. Yu operate the business smoothly with what she had learned at the University. "As Operations Manager, I participated in all stages and aspects of our business such as visiting storage yard, negotiating and reaching final agreements. In the suppliers' yards, offers and quotations, I found some high-tech and military equipment, all of which were imported as 'scrap metal' to cover the unlawful acts." (A.R. 6483)

After coming to the United States, Mr. Yu indicated to Ms. Zhang that he no longer desired to continue with the business and assisting the Chinese Government. Mr. Yu and Ms. Zhang met Harry Wu,

the President of the Laogai Research Foundation, through her friend Lin Zhang. Id. Mr. Zhang himself had been persecuted at the hands of the Chinese Government. Id. Mr. Wu devotes himself to the improvement of human rights in China. Id. Mr. Yu decided that he would expose the illegal practices of the Chinese Government with Wu's assistance. Id.

Ms. Zhang gathered the background information of the company, business documents, and pictures taken by Mr. Yu while he worked in the Public Security Bureau and turned them over to Mr. Wu. Id. Mr. Yu also wrote down his knowledge about the Chinese Government and their practices. Id. Ms. Zhang printed out all the information and did all the translations. Id. Ms. Zhang clearly intended to expose the unlawful practices of the Chinese Government. (A.R. 6484) Ms. Zhang provided extensive cooperation with Wu and the FBI, which will be discussed herein.

In her I-589, Ms. Zhang fears persecution and torture from the Chinese Government. (A.R. 6484-6488) She was sent out by the Security Bureau and ended up cooperating against the Government. (A.R. 6484) She was working with Wu, who is considered an enemy of China. (A.R. 6484)

Ms. Zhang's I-589 was referred to the Immigration Court. A Notice to Appear was issued alleging that Ms. Zhang was an overstay and subject to removal from the United States.

In removal proceedings, Ms. Zhang applied for asylum, withholding of removal, and relief under CAT. Her case was consolidated with the case of her cousin,

Hong Yu, and his son. Ms. Zhang and her cousin were represented by Thomas Moseley.

The hearings were conducted in New York. Ms. Zhang testified at the hearing as well as her cousin, Mr. Wu, and other witnesses. The parties stipulated as to the content of much of Ms. Zhang's testimony. The Court admitted 49 exhibits.

Ms. Zhang only briefly testified. Zhang joined the Communist Party because it is a prize for good students. (A.R. 959) She graduated college in 1997. (A.R. 960) She has never worked for the Chinese Government. (A.R. 960)

Ms. Zhang helped her cousin with his business. However, she testified that she did not even enter the United States until after Yu made the shipment of high-tech and military equipment. (A.R. 955)

Ms. Yu testified that she and her cousin went to the FBI to expose the Chinese Government for its activities. (A.R. 962) She does not support the current Government. (A.R. 962) She met with Harry Wu six to seven times. (A.R. 964) She also met with the FBI. (A.R. 962-964) Ms. Zhang did not continue her activities for the company or in support of the Chinese Government after she and her cousin began their cooperation. Id. Ms. Zhang provided what she believed to be valuable information to the FBI, including information on the Consulate. Id.

Ms. Zhang fears returning to China. She believes that she will be questioned and harmed due to her cooperation with Wu and the FBI. (A.R. 972-73) She also fears harm due to her religion. (A.R. 965-73)

On August 31, 2009, the Immigration Judge issued a written decision. (A.R. 29-100) The only analysis on Ms. Zhang's applications was contained in the last three pages of the IJ's decision. (Appendix 4, A.R. 98-100) The IJ states that he is concerned with the veracity of Ms. Zhang's claim and finds her to be a danger to national security. (Appendix 4, A.R. 98) The Court found insufficient evidence of what she did to assist the FBI. Id. As a basis for his finding on veracity, the IJ states that Ms. Zhang is not familiar with the Chinese Democratic Party or the dissident Democratic movement in the United States. Id. Without citing the inconsistencies he was referring to, the IJ states that Petitioner fails to explain the inconsistencies. (Appendix 4, A.R. 99) The withholding application was denied on the national security grounds. Id. Additionally, the IJ also denied CAT relief because Ms. Zhang allegedly did not submit evidence that she is at risk of torture. (Appendix 4, A.R. 99)

Ms. Zhang appealed to the Board of Immigration Appeals. The Board found the appropriate legal standard is "if there is information that would permit a reasonable person to believe and alien may pose a danger to national security." (Appendix 3, A.R. 4) In assessing this, the Board found that Ms. Zhang's past actions in assisting her cousin were grounds that establish "reasonable grounds" under the Act. Id. The Board also found that Ms. Zhang was ineligible for CAT relief. (Appendix 3, A.R. 2-3) The Board also found that "the state-created danger exception is not a viable theory giving rise to a cognizable substantive due process in the immigration context within the Second Circuit." (Appendix 3, A.R. 6)

Ms. Zhang petitioned this Court for review of a Board's decision. On October 16, 2009, this Court issued a decision denying the Petition for Review. The Court declined to address the ineffective assistance of counsel claim because it was not raised below. The Court also found no reason to disagree with the Board's decision finding that the state-created danger doctrine does not apply in immigration proceedings. The Court found no error with the finding that the national security bar applied in that Ms. Zhang knew the nature of the mission and assisted her cousin in pursuing this mission.

On October 16, 2009, this Court also issued a decision in the cases of Zhang's cousin and his son. (07-2104, 07-2496) The panel remanded the cases due to evidentiary errors. Yu v. Holder, 2009 WL 3326472 (2d. Cir. 2009).

Ms. Zhang filed a timely Petition for Rehearing and Suggestion For Rehearing En Banc. This was denied by the Second Circuit.

REASONS FOR GRANTING THE WRIT

The instant case presents issues of exceptional importance. The first involves the proper interpretation of "reasonable grounds for regarding an alien as a danger to the security of the United States." The Agency's interpretation of this phrase is contradicted by the plain language of the statute. A finding that a person is a danger to national security has extremely serious consequences as it acts as a bar to all relief other than CAT. The second issue of exceptional importance is whether the state-created danger doctrine is applicable in removal cases. The

Second Circuit has not addressed this issue in a published opinion.

In Matter of A-H-, 23 I&N Dec. 774 (A.G. 2005), the Attorney General found that the "reasonable grounds for regarding" standard "is satisfied if there is information that would permit a reasonable person to believe that the alien may pose a danger to the national security." Zhang contends that the Attorney General's interpretation of "is a danger" is incorrect. The statute requires more than a finding that someone may pose a risk to national security. See Yusupov v. Attorney Gen., 518 F.3d 185, 201 (3rd Cir. 2008). The plain language of the statute does not refer to a mere belief or possibility. Id. The statute does not encompass someone who might or could be a danger to national security. Id. The use of "is" indicates that Congress intended this section to be applicable to individuals "who (under a reasonable belief standard) actually pose a danger to U.S. security." Id.

The Agency applied the Attorney General's interpretation as it was required to do. It cannot be disputed that Ms. Zhang cooperated with the United States Government. There is a significant difference between someone who is a danger versus someone who may become a danger. This is especially true where there is evidence that an individual ceased the prior illicit activities as is the case here. A remand is appropriate for analysis under the correct interpretation. It cannot be said that the result would be the same if the appropriate standard was applied. The proper interpretation of the phrase "reasonable grounds for regarding an alien as a danger to the security of the United States" should be addressed by this Court. Otherwise, the Agency will continue to

apply an improper interpretation that is inconsistent with the plain language of the statute.

The other issue of exceptional importance is the applicability of the state-created danger doctrine in the removal context. For the reasons set forth herein, an alien has a due process right not to be deported to a country where she faces harm where the risk of harm was created by the Government. As the Second Circuit stated in its decision, this is an issue of first impression in the Second Circuit. The issue should be addressed by this Court.

I. The Board erroneously found that Ms. Zhang is a threat to national security.

An alien is ineligible for asylum if there are reasonable grounds for regarding an alien as a danger to the security of the United States. 8 U.S.C. § 1158(b)(2)(A)(iv). This also operates as a bar to withholding of removal. 8 U.S.C. § 1231(b)(3)(B)(iv).

The Attorney General has addressed the standard for finding "reasonable grounds for regarding an alien as a danger to the security of the United States." Matter of A-H-, 23 I&N Dec. 774 (A.G. 2005). The Attorney General found that any nontrivial danger to national security is sufficient to trigger the bar. Id. at 797. "National security" means "national defense, foreign relations, or economic interests." Id. at 797. The "reasonable grounds for regarding" standard "is satisfied if there is information that would permit a reasonable person to believe that the alien may pose a danger to the national security."

Zhang contends that the Attorney General's interpretation of "is a danger" is incorrect. The statute requires more than a finding that someone may pose a risk to national security. See Yusupov v. Attorney Gen., 518 F.3d 185, 201 (3d. Cir. 2008). The plain language of the statute does not refer to a mere belief or possibility. Id. The statute does not encompass someone who might or could be a danger to national security. Id. The use of "is" indicates that Congress intended this section to be applicable to individuals "who (under a reasonable belief standard) actually pose a danger to U.S. security." Id.

The instant case should have been remanded by the Second Circuit because the Agency's incorrect interpretation of the statute. The statute requires that an alien actually pose a danger to U.S. security. In its decision, the Board cites the improper standard and Zhang contends it was applied to her case. The Board states that she is capable of participating in future activities, which would not indicate that she is a danger but instead that she may be a danger. The Agency should have applied the proper standard in the first instance. Therefore, a remand is warranted. Yusupov, 518 F.3d at 201-02.

Additionally, substantial evidence does not support the Agency's finding that there are reasonable grounds for regarding Zhang as a danger to national security. The Second Circuit's analysis focuses solely of her actions prior to cooperating with the Government. She had a minimal role in Yu's business. Ms. Zhang was not even present in the United States at the time of the shipment of the equipment to China and no evidence shows that she was involved with this shipment. FBI Agent Belle Chen's declaration

submitted to the immigration court states only that one shipment was made to China by Yu. (Special Appendix, p. 812) Thus, it was improper for the Agency to find that she assisted in the transportation of this equipment.

The evidence compels a conclusion that Ms. Zhang does not pose a threat to national security at this time. As set forth above, it is insufficient to show that she may be a threat at a later date. The IJ inappropriately cited discrepancies in Ms. Zhang's testimony as a basis for doubting her veracity without citing such discrepancies or giving her an opportunity to respond. The discrepancies did not exist.

Ms. Zhang stated that she assisted her cousin with his business. She does not dispute that the business was involved in improper activities or that she knew of the activities in which she was supporting.

Ms. Zhang and her cousin decided to cooperate with authorities. Both took affirmative steps to provide useful information to both Harry Wu and the FBI. Contrary to the Agency's characterization of Ms. Zhang's cooperation, the evidence establishes that she withdrew from the improper activity and assisted the Government. She was instrumental in gathering evidence against the Chinese Government. Ms. Zhang met with Wu six to seven times, translated when the FBI spoke to Mr. Yu, and provided evidence and information. Nothing in the record contradicts Ms. Zhang's account of what happened regarding the cooperation. This evidence certainly shows that she cannot be considered a danger to the security of the United States.

It was improper for the Agency to doubt Ms. Zhang's veracity because she was not aware of or involved in anti-Chinese Government movements in the United States. It is not inconsistent to oppose the Chinese Government and not support these movements. Ms. Zhang withdrew from her assistance to the Chinese Government. This does not require that she be involved with or be aware of opposition groups to the Government.

As set forth above, the Agency and the appellate court focused on Ms. Zhang's past actions prior to cooperation with the FBI. The decisions in the instant case do not point to anything to show that Ms. Zhang "is" a danger to the security of the United States. She has cooperated with the United States Government. Based on the foregoing, the Agency's decision must be overturned.

II. The Second Circuit erroneously concluded that the state-created danger doctrine does not apply in removal proceedings.

Ms. Zhang contends that the Second Circuit erroneously concluded that the state-created danger doctrine is not applicable in immigration proceedings. Ms. Zhang contends that her due process rights were violated when the Government ordered her removed to China when she assisted the United States Government in providing information against the Chinese Government. As a result, Ms. Zhang fears retribution from the Government upon her return. It is impermissible for the Government to create the danger and then fail to protect Ms. Zhang from this danger. This constitutes a violation of Ms. Zhang's due process rights.

It is well settled than an alien has Fifth Amendment due process rights. Mathews v. Diaz, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 (1976). As a general rule, the United States Government is not liable for actions against third parties. DeShaney v. Winnebago County, 489 U.S. 189, 195-96, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). However, there is an exception when the Government creates the danger. See Soto v. Flores, 103 F.3d 1056, 1063 (1st Cir. 1997) *cert. denied* 522 U.S. 819, 118 S.Ct. 71, 139 L.Ed.2d 32 (1997); L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992); Wood v. Ostrander, 879 F.2d 583, 588 (9th Cir. 1989), *cert. denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990)(holding that Wood raised a triable issue of fact as to whether the government affirmatively placed her in danger). Thus, in certain cases, "an affirmative duty to protect" an individual from private violence "may arise." Rivera v. Rhode Island, 402 F.2d 27, 34 (1st Cir. 2005). The Ninth Circuit has extended this doctrine to the immigration context to enjoin deportation. Wang v. Reno, 81 F.3d 808 (9th Cir. 1996)(holding that it was proper to enjoin Wang's deportation to China where the U.S. Government essentially forced Wang to testify which placed him at risk of torture upon his return to China).

In the instant case, the United States Government has placed Ms. Zhang in serious danger of being subjected to persecution and torture upon her return to China. She has provided information against the Chinese Government. The background evidence submitted establishes that China's human rights record is atrocious and those deemed opposed to the Government face significant harm. Ms. Zhang is a traitor and will face serious harm when she returns to

China due to her cooperation with the United States Government. Now that Ms. Zhang is no longer useful to the FBI, it is unconscionable for them to cast her aside and send her back to China where she faces torture.

The Agency did not address the merits of this issue, finding only that the state-created danger doctrine is not applicable to immigration cases. There is no justifiable reason to apply the doctrine in other contexts and exclude immigration cases. As set forth herein, Zhang contends that it is applicable and that the case must be remanded to allow for application of the doctrine to the facts of the case. INS v. Ventura, 537 U.S. 12, 16 (2002)(remand appropriate to allow Agency to address the issue in the first instance).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 07-2119-ag
NAC

[Filed October 16, 2009]

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of October, two thousand nine.

PRESENT:
DENNIS JACOBS,
Chief Judge,
JOSÉ A. CABRANES,
DEBRA ANN LIVINGSTON[1],
Circuit Judges.

BEIBEI ZHANG,)
Petitioner,)

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[1] Judge Debra Ann Livingston, originally a member of this panel, recused herself from this case. The remaining two members of the panel, who are in agreement, decide this case in accordance with Second Circuit Local Rule 0.14(b).

v.)
)
ERIC H. HOLDER JR., ATTORNEY GENERAL,**)
Respondent.)
)

FOR PETITIONER: Frances N. Ruiz, Jamaica, New York.

FOR RESPONDENT: Gregory G. Katsas, Acting Assistant Attorney General, Christopher C. Fuller, Alison Marie Igoe, Senior Litigation Counsel, United States Department of Justice, Civil Division, Office of Immigration Litigation, Washington, D.C.

UPON DUE CONSIDERATION of this petition for review of a decision of the Board of Immigration Appeals ("BIA"), it is hereby ORDERED, ADJUDGED, AND DECREED, that the petition for review is DENIED.

Petitioner Beibei Zhang, a native and citizen of the People's Republic of China, seeks review of the April 18, 2007 order of the BIA affirming the August 31, 2004 decision of Immigration Judge ("IJ") Robert D. Weisel, denying her application for asylum,

** Attorney General Eric H. Holder Jr. is automatically substituted for former Attorney General Alberto R. Gonzales as the respondent in this case. Fed. R. App. P. 43(c)(2).

withholding of removal, and relief under the Convention Against Torture ("CAT"). *In re Beibei Zhang*, No. A076 106 064 (B.I.A. Apr. 18, 2007), *aff'g* No. A076 106 064 (Immig. Ct. N.Y. City Aug. 31, 2004). We assume the parties' familiarity with the underlying facts and procedural history of the case.

When the BIA's decision closely tracks but does not expressly adopt the IJ's reasoning, we may consider both decisions "for the sake of completeness." *Zaman v. Mukasey*, 514 F.3d 233, 237 (2d Cir. 2008). When the BIA agrees with the IJ's decision and supplements that decision, we review the IJ's decision as supplemented by the BIA. *See Yan Chen v. Gonzales*, 417 F.3d 268, 271 (2d Cir. 2005). Questions of law and the application of law to undisputed fact are reviewed *de novo*. *See Bah v. Mukasey*, 529 F.3d 99, 110 (2d Cir. 2008). Factual findings, including adverse credibility determinations, are reviewed for substantial evidence. 8 U.S.C. § 1252(b)(4)(B); *Dong Gao v. BIA*, 482 F.3d 122, 126 (2d Cir. 2007).

As a preliminary matter, we decline to consider Zhang's allegations that she received ineffective assistance from the attorney who represented her before the agency because she did not first present those claims before the BIA. *See Yi Long Yang v. Gonzales*, 478 F.3d 133, 142 (2d Cir. 2007) ("We generally require that ineffective assistance [of counsel] claims be presented in the first instance to the BIA, either through a motion to reopen or on direct appeal.").

Zhang argues that the BIA erred in rejecting her attempts to invoke the "state-created danger doctrine" as a basis for relief. Zhang's argument raises an issue

of first impression in this Circuit, but we see no reason to disagree with the BIA's conclusion, which relies on cases holding that the state-created danger doctrine does not apply in immigration proceedings. *See, e.g., Kamara v. Att'y Gen.*, 420 F.3d 202, 216-18 (3d Cir. 2005). Accordingly, we will not disturb the BIA's conclusion in this regard.

An alien is ineligible for asylum if "there are reasonable grounds for regarding the alien as a danger to the security of the United States." *See* 8 U.S.C. § 1158(b)(2)(A)(iv); 8 C.F.R. § 208.13(c)(1). Similarly, an alien is ineligible for withholding of removal if "there are reasonable grounds to believe that the alien is a danger to the security of the United States." *See* 8 U.S.C. § 1231(b)(3)(B)(iv); 8 C.F.R. § 1208.16(d)(2). Zhang challenges the agency's application of the national security bar to her claims for relief, but Zhang's brief to this Court challenges only one of the agency's several findings in support of its conclusion that there were reasonable grounds for regarding her as a threat to the security of the United States. She has therefore waived any challenge to the remaining findings. *See Yueqing Zhang v. Gonzales*, 426 F.3d 540, 541 n.1, 545 n.7 (2d Cir. 2005). Moreover, we are unpersuaded by her conclusory argument, unsupported by citations to any legal authority, that the agency erred by basing its application of the national security bar on her testimony and written statements that she knew the nature of her mission in the United States and assisted her cousin in pursuing that mission.

For the foregoing reasons, the petition for review is DENIED. As we have completed our review, any stay of removal that the Court previously granted in this

petition is VACATED, and any pending motion for a stay of removal in this petition is DISMISSED as moot. Any pending request for oral argument in this petition is DENIED in accordance with Federal Rule of Appellate Procedure 34(a)(2), and Second Circuit Local Rule 34(b).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By:_____

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A76 106 064 - New York City

Date: APR 18 2007

In re: BEIBEI ZHANG

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Thomas E. Moseley, Esquire

ON BEHALF OF DHS: Randa Zagzoug
Deputy Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law

APPLICATION: Asylum, withholding of removal, Convention Against Torture, voluntary departure

ORDER:

PER CURIAM. The respondent is a native and citizen of the People's Republic of China. The respondent sought asylum and withholding of removal under sections 208(a) and 241(b)(3) of the Immigration and Nationality Act ("Act"), 8 U.S.C. §§ 1158(a), 1231(b)(3), as well as protection under the Convention Against Torture ("CAT") under 8 C.F.R. §§ 1208.16-.18 (2006).[1] The respondent has appealed an Immigration Judge's September 2, 2004, decision denying her asylum, withholding of removal, CAT protection, and voluntary departure.

The Immigration Judge's decision sets out the facts of this case in a thorough and meticulous manner. We commend the Immigration Judge on conducting a thorough hearing in this complex and difficult case, and then issuing a well-written decision. Because the facts of this case are not in dispute, but rather how those facts and the respondent's actions and motives are to be interpreted, we will not restate the facts as part of our decision. We adopt and incorporate as not clearly erroneous the Immigration Judge's factual findings found in his written decision.

The respondent argues that there were no reasonable grounds for finding she was a danger to the

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[1] Hong Yu (A76 106 062) was the lead respondent in the proceedings before the Immigration Judge and he is the subject of a separate but contemporaneous order from this Board. Beibei Zhang (A76 106 064), the subject respondent of this Board order, is Hong Yu's cousin. Hong Yu's son, Tianyi Yu (A76 106 063), is the subject of another separate but contemporaneous order from this Board.

security of the United States and that the evidence of record does not support the Immigration Judge's application of the national security bars. We disagree. The Act states that an alien is ineligible for asylum when "there are reasonable grounds for regarding the alien as a danger to the security of the United States." Section 208(b)(2)(A)(iv) of the Act. A similar bar exists for withholding of removal. Section 241(b)(3)(B)(iv) of the Act, 8 U.S.C. § 1231(b)(3)(B)(iv) (2006) (providing that an alien is ineligible when "there are reasonable grounds to believe that the alien is a danger to the security of the United States"). This statute's reference to "danger" was not qualified by Congress, which makes it clear that Congress intended any nontrivial level of danger to national security as sufficient to trigger this statutory bar. Read as a whole, therefore, the phrase "danger to the security of the United States" is best understood to mean a risk to the Nation's defense, foreign relations, or economic interests. *See Matter of A-H-*, 23 I&N 774, 788-90 (A.G. 2005). Where, under the circumstances, information about an alien supports a reasonable belief that the alien poses a danger-that is, any nontrivial degree of risk-to the national security, the statutory bar to eligibility is applicable.

The statutory reference to "reasonable grounds" implies the use of a reasonable person standard—generally interpreted as "probable cause" standard. *See Adams v. Baker*, 909 F.2d 643, 649 (1st Cir. 1990). The Attorney General has held that as used in the national security-related provisions of the Act, "reasonable grounds for regarding" is *substantially less stringent* than the preponderance of the evidence standard. *See Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (noting that "probable cause" is a less

demanding standard than "preponderance of the evidence"); *Illinois v. Gates*, 462 U.S. 213, 235 (1983) ("Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable cause] decision."); *see Matter of A-H-, supra.* The "reasonable grounds for regarding" standard is satisfied if there is information that would permit a reasonable person to believe that the alien may pose a danger to the national security. *See, e.g., Illinois v. Gates*, 462 U.S. at 235. Where the evidence indicates that one or more of the grounds for mandatory denial of an application for relief may apply, the alien has the burden of proving by a preponderance of the evidence that such grounds do not apply. *See* 8 C.F.R. § 1240.8(d).

Although the respondent claims she was not a spy, she stated that she knew that her mission in residing in the United States was to engage in espionage on behalf of the People's Republic of China (Zhang Exh. 2; Tr. at 492-99). The respondent admitted to assisting Hong Yu in his United States business, which was a cover for being an operative for the Ministry of State Security ("MSS") and an intelligence officer for the People's Republic of China. The respondent also admitted to assisting her cousin in illegally smuggling United States "high-tech and military equipment, all of which were imported as 'scrap metal' to cover the unlawful acts" (Zhang Exh. 2). We find that this information is enough to trigger concerns about the respondent and to establish "reasonable grounds" under the Act. We note that the respondent is also not currently incarcerated or detained in the United States. The respondent is a free member of society, capable of participating in the same business activities

that were once a cover for exporting illegal items in her cousin's espionage business for China. The DHS produced significant evidence to support its position that the respondent was and is a danger to our national security. Moreover, the Immigration Judge concluded that the respondent failed to rebut the DHS' position that she has and continues to pose a danger to national security. We see no clear error in the Immigration Judge's factual findings and conclude that they establish the "reasonable grounds" necessary for triggering the relief and protection bars. Based upon the current record, which indicates this mandatory ground for denial may exist, and the respondent's failure to carry the burden to show otherwise, we find no error in the Immigration Judge's ruling that the respondent poses a threat to national security. *See* 8 C.F.R. § 1240.8(d). For all the reasons noted by the Immigration Judge, we agree that the respondent was statutorily ineligible for asylum based upon reasonable grounds for regarding her a threat to national security. An application for withholding of removal under the Act and under the CAT shall be denied if respondent falls within an exception proscribed in section 241(b)(3)(B). *See* 8 C.F.R. § 1208.16(d)(2). As there are reasonable grounds to believe that the respondent is a danger to the security of the United States, her application for withholding of removal under the Act and under CAT must be denied. *See id.* For these reasons, we find that the Immigration Judge correctly concluded that the respondent was ineligible for withholding of removal under both the Act and the CAT.

Even if barred from withholding of removal under the CAT, 8 C.F.R. § 208.17(a) provides that an alien who has been found under section 208.16(c)(3) to be

entitled to protection under the CAT, and who is subject to the provisions for mandatory denial of withholding of removal, shall be granted deferral of removal to the country where she is more likely than not to be tortured. The respondent claimed that she was concerned with returning to China based upon her meetings with the Federal Bureau of Investigation (FBI), contacts with Chinese dissidents, and because of her conversion to the Yi Guan Dao faith (Tr. at 492-503). Although the Immigration Judge did not specifically address her Yi Guan Dao claim, ultimately, the Immigration Judge found that the respondent did not establish eligibility for protection under the CAT.

The Immigration Judge noted many unexplained deficiencies and inconsistencies in her claim. The Immigration Judge also stated that he "is concerned with the respondent's veracity regarding her claim" (I.J. Dec. at 70) and that she "failed to explain persuasively the inconsistencies in her testimony" (I.J. Dec. at 71). Furthermore, this Board is entitled to take administrative notice of country conditions. *See Yang v. McElroy*, 277 F.3d 158 (2d Cir. 2002); *see also Matter of S-M-J.*, 21 I&N Dec. 722 (BIA 1997). Accordingly, we take administrative notice that there is no evidence that members of the Yi Guan Dao faith face abuse amounting to torture in China. *See United States Department of State; October 2005, China: Profile of Asylum Claims And Country Conditions* ("State Department Report") at 2-9. At best, the evidence presented by the respondent on this issue amounted to her inability to openly practice Yi Guan Dao in China. To establish eligibility for this protection, the respondent carries the heavy burden of demonstrating that it is more likely than not that she would face abuse amounting to torture. Evidence of difficulty,

discrimination, or even harassment in practicing her religion does not carry this heavy burden and her claims of torture are speculative at best. *See Matter of J-F-F*, 23 I&N Dec. 912 (A.G. 2006). As such, for all the reasons noted by the Immigration Judge, we agree with his conclusion that the respondent failed to carry her burden of demonstrating that it was more likely than not that she would be subjected to abuse amounting to torture upon her return to China. Accordingly, we conclude that she is not entitled to the relief of deferral of removal under the CAT.

On appeal, the respondent articulates a substantive due process challenge. Specifically, the respondent argues that her removal to China would violate her right to substantive due process under the state-created danger theory, the exception to the general rule that the state is under no obligation to protect individuals from harm inflicted by private parties. *See Deshaney v. Winnebago County Department of Social Services, et al.*, 489 U.S. 189, 197 (1989). The respondent contends that, because she had contacts with the FBI and Chinese dissidents, she would face retribution in China. In support of this argument, the respondent cites to various cases which, upon review, we find of limited persuasive value. For instance, *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996) does not recognize a due process claim for state-created danger in the immigration context. Moreover, and glaringly omitted in the respondent's otherwise comprehensive appellate brief, the District Court's decision in *Builes v. Nye*, 239 F.Supp2d 518 (MD.Pa. 2003), was specifically disagreed with and thereby rendered of no precedential force and effect by the United States Court of Appeals for the Third Circuit. *See Kamara v. Attorney General of the United States*, 420 F.3d 202,

217 (3d Cir. 2005) (holding that the "state-created danger exception has no place in our immigration jurisprudence" and further noting that "[e]xtending the state-created danger exception to final orders of removal would impermissibly tread upon the Congress' virtually exclusive domain over immigration, and would unduly expand the contours of our immigration statutes and regulations, including the regulations implementing the CAT"). Regardless, we note that the Board is not bound to follow the published decisions of a United States district court in cases arising in the same district, much less outside that district. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993); *see also Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989) (stating that "[w]here we disagree with a court's position on a given issue, we decline to follow it outside the court's circuit").[2] Based on the foregoing, we are unpersuaded that the state-created danger exception is a viable theory giving rise to a cognizable substantive due process claim in the immigration context within the jurisdiction of the Second Circuit. *See Matter of Fede*, 20 I&N Dec. 35 (BIA 1989) (stating "[t]he Board and immigration judges (except as provided by statute) only have such authority as is created and delegated by the Attorney General"); *see generally Matter of Medina* 19 I&N Dec. 734, 742 (BIA 1988) (denying relief where "Congress ha[d] not enacted the individual remedy in deportation proceedings that [was] sought by the respondent").

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[2] *Builes v. Nye, supra*, is a district court case arising within the jurisdiction of the United States Court of Appeals for the Third Circuit, whereas the instant case arises within the jurisdiction of the Second Circuit.

Finally, under section 101(f) of the Act, an alien may be found to be lacking in good moral character even if her conduct does not fall within any of the grounds specified in section 101(f)(1) through (9) of the Act. The record reflects that the respondent admitted to engaging in espionage activities against the United States (Zhang Exh. 2). In considering the totality of respondent's record, we find that the Immigration Judge correctly found that the respondent was not a person of good moral character. Upon reviewing the pertinent positive and negative factors present in the record, we further agree with the Immigration Judge that the respondent failed to establish that she is deserving of a favorable exercise of discretion. As the positive factors of record were outweighed by the negative factors, voluntary departure is not warranted as a matter of discretion. Accordingly, we dismiss the respondent's appeal.

/s/

FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
26 FEDERAL PLAZA
NEW YORK, NEW YORK

[Dated August 31, 2004]

In the Matters of	)
	)
YU, Hong (A76 106 062)	)
YU, Tianyi (A76 106 063)	)
ZHANG, Beibei (A76 106 064)	)
	)
Respondents	)
	)

IN REMOVAL PROCEEDINGS

CHARGE:	INA § 237(a)(1)(B)	Remained in the United States for a Time Longer than Permitted

APPLICATIONS:	INA § 208	Asylum
	INA § 241(b)(3)	Withholding of Removal
	INA § 240B(1)	Voluntary Departure
	8 C.F.R. § 208.16	Convention Against Torture

ON BEHALF OF THE RESPONDENTS
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ON BEHALF OF THE BUREAU
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DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. FACTUAL AND PROCEDURAL HISTORY

The Respondents[1] are natives and citizens of the People's Republic of China. See Ex. 1. Respondent 1 is Hong Yu, father of Respondent 2, Tianyi Yu, a minor. The Respondents conceded notice when presented in Court with Notices to Appear ("NTA") issued by the

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[1] For the sake of clarity, Hong Yu (A76 106 062) is henceforth referred to as Respondent 1, Tianyi Hu (A76 106 063) as Respondent 2, and Beibei Zhang (A76 106 064) as Respondent 3.

Bureau.[2] Respondent 1 was admitted into the United States ("U.S.") with a L-1 Visa on January 8, 1998, authorized to remain until June 4, 1998, and remained thereafter without authorization. Respondent 2 entered the U.S. on the same date with an L-2 Visa and also remained thereafter without authorization. Respondents 1 and 2 have jointly filed an asylum application. Respondent 3 entered the U.S. at New York, New York on or about February 10, 1998 as a nonimmigrant B-1 visitor for business with authorization to remain in the U.S. for a temporary period not to exceed December 31, 1998. See Ex. 1. She remained in the United States beyond December 31, 1998 without authorization from the Bureau. See Ex. 1. Respondent's Form I-589, Application for Asylum and Withholding of Removal, was received on January 6, 1999 by the Court. See Ex. 2 (Zhang). The Bureau issued an NTA on March 9, 1999, charging Respondent 3 with removability under Section 237(a)(1)(B) of the Act as a nonimmigrant who remained in the United States longer than the time permitted. See Ex. 1.

On July 6, 1999, the cases for all three Respondents were consolidated. On that same date, Respondents 1 and 2 conceded service of their NTA and admitted the charges contained therein. On July 19, 1999, the Respondents requested relief in the form of asylum on the basis of political opinion under Section 208 of the Immigration and Naturalization Act ("INA" or "Act"),

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[2] The Immigration and Naturalization Service has been divided under the newly created Department of Homeland Security. Investigative and enforcement responsibilities for enforcement of federal immigration laws including representation before the Court was transferred to the Bureau of Immigration and Customs Enforcement ("Bureau").

withholding of removal under INA § 241(b)(3), Convention Against Torture Under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), and, alternatively, voluntary departure under INA § 240B(1). The Bureau opposed asylum relief, alleging that Respondents 1 and 3 are not bona fide defectors, are a U.S. security risk, and are otherwise barred under INA § 241(b)(3)(B).

On March 18, 2003, the Bureau notified the Court that the FBI declassified a substantial portion of the evidence, obviating the need for in camera proceedings and requisite security clearances. In addition, the Court reversed the previous consolidation of the cases, separating Respondent 3 from Respondents 1 and 2 for purposes of removal proceedings. Respondents 1 and 2 remained joined, however. On that same date, Respondent 1 denied charges that his admission and visa were procured by fraud. The Court however, sustained the charges of fraud as listed on the NTA. Counsel for the Respondents and the Bureau also stipulated to the Bureau's motion for a protective order, which was signed by the Court on December 1, 2003. See Ex. 16.

On March 10, 2004, the Respondents were reconsolidated in the interests of judicial economy, although two separate decisions would be issued, one for Respondents 1 and 2 and the other for Respondent 3. The Respondents renewed their requested relief in the form of political asylum under INA § 208, withholding of removal under both INA § 241(b)(3) and the Convention Against Torture, and, in the alternative, voluntary departure under INA § 240B(1).

The Court sustained the Bureau's charge under INA § 237(a)(4)(A)(i), namely that Respondent 1 engaged in espionage activity, rendering him deportable under the Act.

* * *

III. Respondent Beibei Zhang (A76 106 064)

A. Asylum

The Court finds the Respondent is statutorily ineligible for asylum as there are reasonable grounds for regarding her as a danger to U.S. security. See INA § 208(b)(2)(A)(iv). Moreover, the Bureau produced significant evidence to establish "reasonable grounds" under the Act. See Matter of U-H-, 23 I. & N. Dec. 355, 356 (BIA 2002) (finding "reasonable grounds" established if the evidence is sufficient to justify a reasonable person in regarding the alien as a danger.)

The Court is concerned with the Respondent's veracity regarding her claim, which prompts the Court to find she is a danger to national security. The Respondent claimed she never wanted to be a spy. However, the remainder of her testimony refutes this statement. The Respondent testified she was a member of the Communist Party of the People's Republic of China. Prior to her arrival, she was aware her sole purpose in residing in the United States was to engage in espionage on behalf of the People's Republic of China. The Respondent stated under oath she assisted her uncle in the surreptitious transfer of sensitive military hardware to the People's Republic of China. Her contention that she provided valuable information to the FBI is not supported in the record.

The FBI has never confirmed she provided useful information. Furthermore, the FBI accompanied and facilitated the submission of Hong Yu's application for political asylum with the United Stated government. No such action was taken on behalf of Beibei Zhang.

Additionally, in regards to the Respondent's veracity, the Respondent claims she communicated with the FBI to expose the wrongdoings of China, however, the Respondent did not confirm she was familiar with the Chinese Democratic Party, or the Chinese dissident democracy movement in the United States. When asked about her knowledge of either, the Respondent testified to knowing individuals involved in each. The Court questions how the Respondent can explain her testimony that she communicated with the FBI to expose the wrongdoings of China, not because she was a spy, and yet she is not aware of the Chinese Democratic Party and/or the Chinese dissident democracy movement in the United States, two major groups responsible for exposing the wrongdoings of the Chinese government.

On the basis of the foregoing facts, the Court finds the Respondent's presence within U.S. poses a threat to national security. See Matter of Haddam, 2000 WL 1901995 (BIA 2000) (finding alien's presence, not extraneous consequences, form the basis for determining whether to deny asylum under INA § 241(b)(3)(B)(iv)). Moreover, the Respondent failed to rebut the Bureau's position in favor of her ineligibility on grounds of posing a danger to U.S. security. The Respondent failed to explain persuasively the inconsistencies in her testimony. As such, the Respondent has not satisfied the burden of proving by a preponderance of the evidence that the Court's

grounds for mandatory denial under INA § 208(b)(2)(A)(iv) do not apply. See 8 C.F.R. § 1240.8(d). Therefore, the Court finds the Respondent is statutorily ineligible for asylum relief based on reasonable grounds for regarding her a threat to national security.

B. WITHHOLDING OF REMOVAL

The Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3). To establish eligibility for withholding of removal, a respondent's testimony must show a clear probability of persecution in the country designated form removal. I.N.S. v. Stevic, 467 U.S. 407 (1984). Clear probability of persecution requires a showing that it is more likely than not that an applicant would be subject to persecution if returned to the county from which he seeks withholding of removal. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987). The burden of proof required to establish eligibility for asylum is lower than that required for withholding of removal. Id. Once an applicant establishes eligibility, withholding of removal is mandatory and the alien cannot be removed to that country. An application for withholding of removal shall be denied if the Respondent falls within an exception proscribed in INA § 241(b)(3)(B). 8 C.F.R. § 1208.16(d)(2). As previously indicated, there are reasonable grounds to believe that the Respondent is a danger to the security of the United States. INA § 241(b)(3)(B). Therefore, her

application for withholding of removal must be denied 8 C.F.R. § 1208.16(d)(2).

C. CONVENTION AGAINST TORTURE

The Court finds the Respondent has not met the burden of proof to warrant a grant of deferral of removal under Article 3 of CAT as the Respondent has not proven that it is more likely than not she will be tortured upon her return to China. See 8 C.F.R. § 1208.16(c)(2)-(3). The Respondent has alleged in his testimony that she is concerned with returning to China based on her meetings with the FBI, Harry Wu, and Ling Jang.

The Court finds the Respondent has not provided specific grounds to indicate she is personally at risk of torture. See Matter of S-V-, 22 I. & N. Dec. 1306 (BIA 2000). The Respondent has testified she is concerned about returning to China. However, she has not submitted evidence that it is more likely than not that she will be arrested and placed in prison for her involvement with the FBI and Dr. Harry Wu. Furthermore, the Respondent admitted in her testimony that no one in her family has been harmed as a result of her communicating with the FBI and Harry Wu. As such, the Respondent has not met her burden of proof to warrant a grant of removal under Article 3 of CAT as the Respondent has not proven that it is more likely than not she will be tortured upon her return to China. See 8 C.F.R. § 1208.16(c)(2)-(3).

D. VOLUNTARY DEPARTURE

In order to obtain voluntary departure, an applicant bears the burden of establishing both that she is eligible for relief and that she merits a favorable exercise of discretion. See Matter of Gamboa, 14 I. & N. Dec. 244 (BIA 1972). Section 240B(b) of the Act provides that the Attorney General may permit a non-immigrant to depart the United States at her own expense, in lieu of removal, if the applicant: (1) has been physically present in the United States for a period of one year immediately preceding the date the NTA was served; (2) is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure; (3) is not an aggravated felon; and (4) has established by clear and convincing evidence that she has the means to depart the United States and intends to do so. INA § 240B(b). The alien is also required to post a voluntary departure bond in an amount necessary to ensure that the alien will depart, but in no case less than $500. 8 C.F.R. § 1240.26(c)(3) (2004); INA § 240B(b)(3).

The record indicates the Respondent engaged in espionage against the United States, demonstrating her lack of good moral character. Therefore, she does not merit a favorable exercise of discretion. As such, the Court denies the Respondent's request for voluntary departure.

Accordingly, after a careful review of the record, the following orders will be entered:

ORDER

IT IS ORDERED that the Respondents' application for asylum pursuant to Section 208 of the Act be DENIED.

IT IS FURTHER ORDERED that the Respondents' application for withholding of removal pursuant to Section 241(b)(3) of the Act be DENIED.

IT IS FURTHER ORDERED that the Respondents' application for relief under the Convention Against Torture pursuant to 8 C.F.R. § 1208.16 be DENIED.

IT IS FURTHER ORDERED that a deferral of Respondent 1's removal pursuant to 8 C.F.R. § 1208.17 be GRANTED.

IT IS FURTHER ORDERED that Respondent 3's request for Voluntary Departure be DENIED.

IT IS FURTHER ORDERED that Respondent 2 and 3 be REMOVED from the United States to the People's Republic of China.

Date: 8/31/04

/s/ Robert D. Weisel
Robert D. Weisel
U.S. Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 07-2119-ag

[Filed January 12, 2010]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of January, two thousand ten.

BEIBEI ZHANG,
Petitioner,

v.

ERIC H. HOLDER JR., ATTORNEY GENERAL,*
Respondent.

Beibei Zhang having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the

* Attorney General Eric H. Holder Jr. is automatically substituted for former Attorney General Alberto R. Gonzales as the respondent in this case. Fed. R. App. P. 43(c)(2).

active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/
Frank Perez, Deputy Clerk